

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LESLIE C. MOORE and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Denver, CO

*Docket No. 00-126; Submitted on the Record;
Issued November 1, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On October 22, 1998 appellant, then a 44-year-old mailhandler, filed a traumatic injury claim alleging that he was assaulted in the parking lot of his employing establishment by a coworker's spouse on October 5, 1998 and sustained a stress-related anxiety condition as a result. He stopped work on October 6, 1998 and returned October 26, 1998.

The Office of Workers' Compensation Programs received medical evidence diagnosing mild post-traumatic stress disorder and a narrative statement from appellant relating the facts surrounding the assault, which allegedly caused his condition. The Office also received various witness statements, which corroborated his account of the assault on October 5, 1998.

Appellant alleged in his statement that at 10:15 p.m. on October 5, 1998, he was exiting the employing establishment and talking to friends when he saw Alberta Jackson, a coworker, who said, "that [i]s him, he [i]s the one." Appellant then stated:

"Suddenly, I saw a white vehicle pull around the curve and stop.... A black male exited the vehicle and walked quickly towards me. He said, 'that [i]s my wife, you do n[o]t talk to her like that.' He rushed me quickly and started to attack me by hurling his fist at me. I blocked some of his punches, I tried to defend myself by punching back."

* * *

"During this attack there were witnesses all around me.... At some point the assaulter [sic] tackled or pushed me to the grassy area of the parking lot. I was on

my back, he was positioned by my legs standing. All I could do to stop him from hitting me with his fists was to kick him off of me with my free legs and arms. Out of the corner of my eye, I could see Alberta Jackson.... She was saying something like 'hit him.'

"Luckily, [sic] someone grabbed the assaulter [sic] from behind and held him.... As I picked myself up from the grass I was still angry from the attack. I wanted to punch the assaulter [sic] while he was being held. But I did not. I wanted to kick Alberta Jackson who was still on the grass. But I did not."

Appellant discussed in his statement that he had also had a verbal altercation with Ms. Jackson while working earlier that day. Appellant explained that prior to the verbal altercation, his supervisor had discussed with him which employees she considered assigning to shakeout crews for E-17 and E-10 on tour three. He informed his supervisor of Ms. Jackson's location after she mentioned that Ms. Jackson had been considered for the shift. Appellant stated that Ms. Jackson appeared at his workstation five minutes later with an angry and hostile demeanor and told him to mind his "own damn business about [where] she was working." Appellant stated that Ms. Jackson accused him of snitching on her and as they disputed the facts, a verbal altercation ensued with an exchange of profane language. Appellant stated that after, some time had passed, he did not say anything further and that Ms. Jackson continued to scream obscenities at him and eventually left his workstation.

The employing establishment challenged appellant's October 22, 1998 claim in a letter dated November 13, 1998. It asserted that appellant's tour of duty had ended at approximately 10:30 p.m., prior to the assault, and that he was not in the performance of duty when the assault occurred. It also asserted that appellant had participated in the verbal altercation during his tour of duty, in which profanity was exchanged by both appellant and Ms. Jackson.

Following further development, by decision dated December 7, 1998, the Office denied the claim, finding that appellant failed to establish compensable factors of employment. The Office found that the reason for the attack was due to appellant's inappropriate comments to his female coworker and, therefore, the resulting incident was not a covered work event. The Office, therefore, did not address the medical evidence.

On April 9, 1999 appellant, through counsel, requested reconsideration and submitted additional evidence.

By decision dated May 7, 1999, the Office denied modification of the prior decision.

The Board finds that the case is not in posture for decision.

To establish appellant's claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional or psychiatric

disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.¹

Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.²

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. The Federal Employees' Compensation Act³ provides for the payment of compensation benefits for disability or death of an employee resulting from personal injury sustained while in the performance of duty. The phrase "while in the performance of duty" in the Act has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."⁴ In addressing this issue, the Board has stated:

"In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."⁵

The Board finds that the assault that appellant sustained on October 5, 1998 occurred in the course of his employment. The parking lot where the assault occurred is considered to be a part of the employment premises and appellant has, therefore, satisfied the "course of employment" portion of the performance of duty test. The Board notes, however, that appellant still has to satisfy the "arising out of" portion of the test before his injury would be deemed to have occurred in the performance of duty. "Arising out of the employment" requires that a factor of employment caused the injury.⁶

¹ See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

² See *Martha L. Watson*, 46 ECAB 407 (1995); *Donna Faye Cardwell*, *supra* note 1.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Bernard D. Blum*, 1 ECAB 1 (1947).

⁵ *Allan B. Moses*, 42 ECAB 575 (1991); *Barry Himmelstein*, 42 ECAB 423 (1991); *Mary Keszler*, 38 ECAB 735 (1987).

⁶ *Charles Crawford*, 40 ECAB 474, 477 (1989) (the phrase "arising out of and in the course of employment" encompasses not only the concept that the injury occurred in the work setting, but also the causal concept that the employment caused the injury); see also *Robert J. Eglinton*, 40 ECAB 195 (1988); *Eugene G. Chin*, 39 ECAB 598 (1988).

Appellant has alleged that the October 5, 1998 assault stemmed from a verbal altercation that occurred with Ms. Jackson, his coworker, while working that day. Appellant stated that the verbal altercation occurred during his tour of duty after he informed a supervisor of Ms. Jackson's whereabouts when she inquired about certain employees considered for an upcoming shift. He indicated that Ms. Jackson approached him with an angry and hostile demeanor, accused him of snitching on her and with profane language told him to mind his own business. Appellant further indicated that they then engaged in a verbal exchange and that they had both used profane language until he eventually stopped talking and she walked away.

In determining whether an assault arises out of employment, the Board has relied on Larson's treatise on workers' compensation law.⁷ Larson states the following:

"Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work.... Assaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor."⁸

The record contains evidence that appellant and Ms. Jackson engaged in a quarrel over the performance of employment duties which contributed to the assault. The evidence also establishes that appellant was reasonably fulfilling the duties of his employment at the time of the verbal altercation on October 5, 1998. The Office asserted in its December 7, 1998 decision that appellant's inappropriate comments to his female coworker ultimately caused the assault and, therefore, the resulting incident was not a covered work event. The Board notes that the Office invoked the affirmative defense of willful misconduct in conjunction with the original adjudication of appellant's claim; however, such defense will not serve to remove appellant from the performance of duty barring compensation in this case. Although appellant's responses to his coworker during their exchange were indeed inappropriate, appellant was approached by Ms. Jackson whereby she initiated an altercation due to his response to a question posed by his supervisor who sought to staff an upcoming shift. As the Board held in *Robert L. Williams*,⁹ "[T]here is no provision in the [Federal] Employees' Compensation Act authorizing the denial of compensation because ... the employee was an 'aggressor,' or the 'initiator,' or otherwise did

⁷ See *Sylvester Blaze*, 37 ECAB 851, 853 (1986).

⁸ 1 A. Larson, *The Law of Workers' Compensation* § 11.00.

⁹ *Robert L Williams*, 1 ECAB 80 (1948).

something imputing culpability or fault on his part.”¹⁰ As appellant remained in the performance of duty at the time of the altercation, compensation could be denied only if it was barred by the affirmative defenses contained in section 8102 of the Act.¹¹ As stated above, the affirmative defense raised by the Office has not removed appellant from the performance of duty barring compensation in this case.

The Board, therefore, finds that, as the assault on appellant on employment premises resulted from a dispute, which occurred during appellant’s tour of duty and regarded work issues, the assault bears a sufficient relationship with his employment to afford coverage. There is no evidence that the basis for the altercation was imported to the work environment. The issue thus becomes whether the medical evidence establishes that this factor contributed to appellant’s emotional condition.¹²

As appellant has implicated a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. The case will be remanded to the Office for the preparation of a statement of accepted facts and referral of appellant to an appropriate medical specialist for an opinion on whether he sustained an emotional condition in the performance of duty causally related to a compensable factor of employment. After such further development of the evidence as it considers necessary, the Office shall issue an appropriate decision on appellant’s entitlement to benefits.

¹⁰ *Id.* at 82.

¹¹ *Robert L. Williams, supra* note 9. 5 U.S.C. § 8102(a) states: “The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, unless the injury or death is -- (1) caused by willful misconduct of the employee; (2) caused by the employee’s intention to bring about the injury or death of himself or of another; or (3) proximately caused by the intoxication of the injured employee.”

¹² *See Abe E. Scott*, 45 ECAB 164 (1993).

The decisions of the Office of Workers' Compensation Programs dated May 7, 1999 and December 7, 1998 are set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
November 1, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member